UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HELEN R. CONOVER ,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
PH-0752-97-0098-I-1

DATE: June 23, 1998

Mitchell Kastner, Esquire, Schneider, Freiberger & Kastner, Red Bank, New Jersey, for the appellant,

Denise M. Marrama, Esquire, Fort Monmouth, New Jersey, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that dismissed her appeal for lack of Board jurisdiction. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal to the Northeastern Regional Office for further adjudication consistent with this Opinion and Order. 5 C.F.R. § 1201.117.

BACKGROUND

Effective January 31, 1995, the appellant resigned from her GS-6 Secretary position under the agency's Voluntary Separation Incentive Program (VSIP). Initial Appeal File (IAF), Tab 8, Subtabs 4a, 4b, 4d, 4e. On August 17, 1995, she filed a formal equal employment opportunity (EEO) complaint with the agency alleging that her resignation was coerced because of retaliation for previous EEO activity and discrimination based on religion (Jewish), disability (physical), sex (female), and age (48). *Id.*, Subtabs 3a, 3b.

On December 5, 1996, the appellant filed an appeal with the Board and requested a hearing. IAF, Tab 1. The administrative judge issued an acknowledgment order informing the appellant of her burden of proof on the jurisdictional issue regarding her resignation and ordering her to submit evidence and argument on the jurisdictional issue, and then issued a second order affording the appellant another opportunity to submit such evidence. IAF, Tabs 2, 12. The administrative judge did not apprise the parties of any issues regarding the timeliness of the appeal. The agency and the appellant responded to the administrative judge's orders. IAF, Tab 6, Tab 8, Subtab 1, Tabs 10, 11, 13. Without affording the appellant her requested hearing, the administrative judge issued an initial decision finding that the appellant had not raised a nonfrivolous allegation that her resignation was involuntary and dismissing the appeal for lack of jurisdiction. IAF, Tab 14.

On petition for review, the appellant asserts that the administrative judge erred in failing to afford her a jurisdictional hearing and in relying on the agency's Report of Investigation into her EEO complaint as evidence that her resignation was voluntary. Petition For Review (PFR) File, Tab 1. With her petition for review, the appellant has submitted a copy of her January 6, 1996 declaration made under penalty for making false statements that is already a part of the record

below. IAF, Tab 13. The agency has timely responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

Jurisdiction

An involuntary resignation is tantamount to a removal, and the appellant is entitled to a hearing on the issue of the Board's jurisdiction over an appeal of an involuntary resignation, if she makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. A nonfrivolous allegation is an allegation of fact that, if proven, could establish a prima facie case that the Board has jurisdiction over the appeal. *Hernandez v. U.S. Postal Service*, 74 M.S.P.R. 412, 416 (1997). In determining whether an appellant has made such a nonfrivolous allegation of fact, the administrative judge may consider the agency's documentary submissions but may not weigh the evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Gutierrez v. U.S. Postal Service*, 73 M.S.P.R. 564, 567-68 (1997).

The appellant asserts on petition for review that the administrative judge improperly relied on the agency's Report of Investigation to find that the Board lacks jurisdiction over this appeal. PFR File, Tab 1 at 4-5. We agree. The administrative judge erred in weighing the evidence of the sworn statements of the witnesses in the EEO proceeding and accepting the conclusions of the investigator to determine that the appellant's allegations were insufficient to warrant a jurisdictional hearing. *Hernandez*, 74 M.S.P.R. at 418; Initial Decision at 4-7.

The appellant asserted below that her resignation was the result of discrimination based on religion, sex, age, and disability, and retaliation for previous EEO activity. IAF, Tabs 1, 6, 13. We find that the appellant has not raised a nonfrivolous allegation that her resignation resulted from discrimination based on religion, sex, or age. None of her submissions raises any facts to support her bare allegation. In submissions that supported her EEO complaint,

she described numerous incidents in which she had an unpleasant confrontation with a co-worker and was not supported in her complaints by her supervisors. IAF, Tab 11, Exhibit A. Basically, she alleges that co-workers were deliberately abusive to her and that her supervisors did not intervene to protect her. She claimed that co-workers, particularly another secretary, Elizabeth Barry, with whom she shared office space, made disparaging remarks to her, talked behind her back about her, expected her to do Barry's work, made harassing telephone calls to her home, and were generally unpleasant to her. The appellant complained to her supervisor, Herbert Groener, about the treatment but received no support. When the appellant expressed her frustration and anger by complaining to him or by confronting the alleged harassers, Groener became annoyed with her. *Id.* On one occasion, he screamed at her, shook his fists in her face, and slammed them down on the desk. *Id.*; IAF, Tab 13, January 6, 1996 declaration. Also, co-worker Barbara Lamb informed Supervisor Thomas Sheehan that the appellant told her she wished that Herbert Groener were dead. IAF, Tab 11, Exhibit F-8 at 263. Sheehan reported this behavior to the department in charge of security clearances and an investigation ensued. *Id.* at 262. The appellant received a written reprimand as discipline for this behavior. *Id.*, Exhibit F-15 at 296, Exhibit F-13 at 282-83. Before any decision on her security clearance was made, however, the appellant resigned. *Id.*, Exhibit F-10 at 268-69.

Even if we accept as true the appellant's allegations that she was mistreated, she does not allege any fact that, if proven, would show that she was mistreated because of her religion, sex, or age. *See Bates v. Department of Justice*, 70 M.S.P.R. 659, 662-63 (1996). She has not described any direct evidence of such discrimination, articulated a connection between her membership in a protected class and the allegedly discriminatory acts, or identified any comparison employee who was similarly situated but treated differently. *See Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997) (an

employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group). Likewise, she did not support her bare allegation that the actions taken were the result of retaliation for engaging in previous EEO activity with facts that, if proven, would establish a nexus between her previous protected activity and the allegedly discriminatory actions.

As for the appellant's claim that her resignation was the result of disability discrimination, we find that the appellant has raised a nonfrivolous allegation sufficient to warrant a jurisdictional hearing. IAF, Tabs 1, 6, 13. The elements of a prima facie case of disability discrimination generally include: A showing that the appellant is a qualified disabled person and the action appealed was based on her disability; and, to the extent possible, an articulation of a reasonable accommodation under which the appellant believes that she could perform the essential duties of her position or of a vacant position to which she could be reassigned. *See Spencer v. Department of the Navy*, 73 M.S.P.R. 15, 24-25 (1997). Ultimately, the appellant must prove that she is a qualified person with disabilities, i.e., a disabled individual who can perform the essential functions of her position with or without reasonable accommodation, without endangering the health and/or safety of herself and/or others. *See* 29 C.F.R. § 1614.203(a); *Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 561 (1997). However, to meet her burden of proof with respect to establishing a prima facie case, the appellant need merely *articulate a reasonable accommodation* under which she believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned. *Id.*

The record contains evidence to show that the appellant had numerous medical problems, such as hypothyroidism, hypertension, chronic fatigue syndrome, severe allergies, hives, angioedema (swelling of the throat, lips, and eyes), anxiety attacks, and panic disorder. According to the appellant's physician, Dr. Rao Gourkanti, she also had stress-related symptoms of persistent anxiety, stomach pain, diarrhea, headaches, chronic sore throat, body aches and pains, heartburn, indigestion, and stress-related stammer. IAF, Tab 11, Exhibit F-20 at 337-40. In her EEO complaint, the appellant alleged that the mistreatment by her co-workers and supervisors caused stress, which in turn caused her symptoms. *Id.*, Exhibit A at 9, 42-43, 53-55, 150-51. She further alleged that she did not like working in the front office, particularly when she was having an attack of hives or swelling of her face, because her appearance was embarrassing. *Id.* at 44-45. She requested that the agency relocate her to a more private place and also sought a transfer from her position, neither of which accommodations the agency agreed to. *Id.* at 5, 152-54. According to the appellant, the agency's failure to accommodate her stress-related disorders by putting an end to the harassing treatment, relocating her work station, or reassigning her led her to accept the VSIP offer and resign. IAF, Tabs 6, 13, the appellant's January 6, 1996 statement. In view of the foregoing, we find that the appellant has raised a nonfrivolous allegation of fact that, if proven, would establish that the Board has jurisdiction over her appeal as an involuntary resignation. *See Jones v. Department of the Navy*, 66 M.S.P.R. 421, 423-25 (1995). Thus, we find it necessary to remand this appeal to the regional office for further adjudication.

The appellant alleges that a hostile work environment caused her to resign, in effect, resulting in a constructive discharge. In cases where the appellant has alleged that intolerable working conditions led to her resignation or retirement, the Board has held that the appropriate test for involuntariness is "whether under

all of the circumstances working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to resign [or retire]." *Markon v. Department of State*, 71 M.S.P.R. 574, 577 (1996) (quoting *Heining v. General Services Administration*, 68 M.S.P.R. 513, 520 (1995)). The Board has further found that, when allegations of discrimination and reprisal are alleged in connection with a determination of voluntariness, such evidence of discrimination or retaliation may only be addressed insofar as it relates to the issue of voluntariness and not whether the evidence would establish discrimination or reprisal under the standard of Title VII. *Markon*, 71 M.S.P.R. at 578. Thus, evidence of discrimination or EEO retaliation goes to the ultimate question of coercion - "'whether under all of the circumstances working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to resign [or retire].'" *Id.* On remand, the administrative judge should consider the appellant's allegations of mistreatment to determine whether, under the particular circumstances, a reasonable person would have felt compelled to resign and should consider the appellant's allegations of disability discrimination as a factor.

The appellant also alleges that her resignation was coerced because she was threatened with loss of her security clearance and resigned under the VSIP to avoid a subsequent removal. PFR File, Tab 1; IAF, Tabs 6, 13. The Board has held that a resignation to avoid a removal that the agency knows could not be substantiated is coerced. *See Lamb v. U.S. Postal Service*, 46 M.S.P.R. 470, 475 (1990). The appellant alleged below that an employee in the agency's security office, Mike Ruther, told her that she would probably lose her security clearance and her position because of letters written by her co-workers which stated that she had mental problems. IAF, Tab 13, the appellant's January 6, 1996 declaration. The agency submitted below a summary of a sworn statement from Ruther taken by telephone in which he denied telling the appellant that she would be fired as a

result of the investigation. IAF, Tab 11, Exhibit F-4 at 231. On remand, the administrative judge shall resolve the conflicting evidence and determine whether the appellant's evidence shows that she was coerced to resign because of the threat of losing her security clearance.

Timeliness

The administrative judge made no finding on the issue of whether the appeal was timely filed. The appellant resigned effective January 31, 1995, filed a formal complaint of discrimination with her agency on August 17, 1995, and filed her appeal on December 5, 1996. IAF, Tab 1 and Tab 8, Subtabs 3a-c, 4a. Under 5 C.F.R. § 1201.22, an appeal to the Board must be filed within 30 days after the effective date of the action being appealed. An appeal that is not filed within the 30-day time limit must be accompanied by evidence to show good cause to waive the filing time limit. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). Here, the appellant's resignation was effective January 31, 1995, but her appeal was not filed until December 5, 1996. The administrative judge did not apprise the parties of the timeliness issues in this appeal or inform the appellant of her burden of proof. We note that the agency never informed the appellant of any right to file an appeal of an adverse action to the Board. An employee is entitled to notice of Board appeal rights from a presumptively voluntary action like a resignation if the employee placed the agency on notice that he considered the presumptively voluntary action to be involuntary, or if the agency was or reasonably should have been aware of facts indicating that the resignation was involuntary. *See Taylor v. U.S. Postal Service*, 73 M.S.P.R. 67, 70, *aff'd*, 121 F.3d 727 (Fed. Cir. 1997) (Table). On remand, the administrative judge shall afford the parties an opportunity to address this timeliness issue.

Also, under 5 C.F.R. § 1201.154(b)(2), an appellant who files a timely formal complaint of discrimination with her agency may appeal the action to the

Board after 120 days have elapsed and the agency has not issued a final decision. In this appeal, although 120 days have passed since the appellant filed her August 17, 1995 formal complaint of discrimination and the agency has not issued a final decision, we are unable to determine from the record whether the formal complaint of discrimination was timely filed with the agency. We note that under 29 C.F.R. § 1614.105(a) an aggrieved person must initiate contact with an agency EEO counselor within 45 days of the date of the alleged discriminatory matter or within 45 days of the effective date of an alleged discriminatory personnel action. *See McGowan v. U.S. Postal Service*, E.E.O.C. Appeal No. 01831826 (Dec. 12, 1983). According to the EEO counselor's report, the appellant first contacted the counselor on August 31, 1994, before the alleged involuntary resignation. The report indicates that the counselor was informed of the appellant's allegation that her January 31, 1995 resignation was involuntary, but does not indicate when the appellant brought this allegation to the EEO counselor. IAF, Tab 11, Exhibit B-1 at 1-2, 7. We are unable to determine whether this allegation was timely brought to the EEO counselor or whether the agency waived the time limit for bringing an allegation to the counselor. 29 C.F.R. § 1614.105(a)(2). The agency accepted the appellant's August 17, 1995 complaint for investigation and did not dismiss it as untimely. IAF, Tab 11, Exhibits C-2, C-3. The agency did not issue a final decision, however, before the appellant filed this appeal with the Board after receiving the agency's September 13, 1996 Report of Investigation. IAF, Tab 8, Subtab 3c. The Equal Employment Opportunity Commission has indicated that an agency's acceptance and investigation of a complaint with no finding on the issue of timeliness is not a waiver of the time limit for initiating a contact with an EEO counselor. *See Ziman v. U.S. Postal Service*, E.E.O.C. Appeal No. 01842595, slip op. at 9 (July 23, 1986) (citing *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir. 1981)). In its submissions to the Board, the agency did not raise any issue of the timeliness of the appellant's EEO complaint. Nevertheless, on remand, the

administrative judge shall afford the parties an opportunity to address the issue of the timeliness of this appeal under 5 C.F.R. § 1201.154(b)(2) as it is affected by the appellant's EEO proceeding.

ORDER

Accordingly, we REMAND this appeal to the Northeastern Regional Office for further adjudication, including a hearing, and a determination of whether the Board has jurisdiction over this alleged involuntary resignation appeal based on the appellant's allegations of disability discrimination, harassment, and the threatened loss of her security clearance and consequent removal from her position. If the administrative judge finds that the Board lacks jurisdiction over this appeal and dismisses it on that basis, she need not address the issue of its timeliness.

If the administrative judge finds that the Board has jurisdiction over this appeal, the administrative judge shall address the issue of the timeliness of this appeal. Alternatively, the administrative judge may address the timeliness issue first. If she finds that the appeal is untimely and that no good cause to excuse the untimely filing exists, the administrative judge may dismiss the appeal on that basis by assuming arguendo that the appeal is within the Board's jurisdiction without actually determining whether the Board has jurisdiction over the appeal. *See Popham v. U.S. Postal Service*, 50 M.S.P.R. 193, 197 (1991).

If the administrative judge finds that the appeal is within the Board's jurisdiction and that it was timely filed or that good cause has been shown to waive the filing time limit, she shall adjudicate the appeal on the merits.

FOR THE BOARD:
Washington, D.C.

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Robert E. Taylor
Clerk of the Board

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

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I concur in the result that the majority reaches.

JUNE 23, 1998

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Beth S. Slavet, Vice Chair